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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MITCHELL RAY LEONARD, PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT AND MOTION TO VACATE THE JUDGMENT BELOW

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QUESTIONS PRESENTED

1. Whether petitioner's Texas convictions for two burlaries of a habitation and one burglary of a building, are convictions for violent crimes under the law of the jurisdiction (the State of Texas) in which those convictions were obtained and thus sufficient to support enhancement of appellant's sentence pursuant to 18 U.S.C. 924(e)(1) and accordingly whether the Congress of the United States of America can subsequently, by definition, alter the character of the underlying offenses - and the resulting convictions - by defining them as violent for the purpose of sentence enhancement.

2. Whether the Fifth Circuit has correctly interpreted whether Congressional intent of 18 U.S.C. 924 or the common law definition of burglary embraced by the Ninth Circuit should be applied.

3. Whether a post factum recharacterization of petitioner's prior offenses violates his due process rights as guaranteed by the Fifth Amendment of the United States?

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PETITION FOR CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
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The Petitioner Mitchell Ray Leonard respectfully prays that a writ of certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered March 20, 1989.

OPINIONS BELOW

The opinion of the court of appeals has not yet been reported. (App. A, infra, A1-A26). The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals (App. A, infra A1-A26) was entered on March 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The court has jurisdiction in this matter on two basis. The opinions of the Courts of Appeals conflict on the definitions of "burglarly" to be applied to 18 U.S.C. 924. Furthermore, the highest criminal court in the State of Texas and the Fifth Circuit court also conflict. For these reasons we believe that this issue is ripe for review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 922 of the Armed Career Criminals Act Pub.L. 97-377, Title I, § 165(a), Dec. 21, 1982, 96 Stat. 1923; Pub. L. 99-308, § 102, May 19, 1986, 100 Stat. 451; Pub.L. 99-408, § 2, Aug. 28, 1986, 100 Stat. 920; Pub.L. 100-649, § 2(a), Nov. 10, 1988, 102 Stat.

3816; Pub.L. 100-690, Title VII, § 7060(c), Nov. 18, 1988, 102 Stat. 4404 provides:

> (g) It shall be unlawful for any person-
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. Section 924 of the Armed Career Criminals Act Pub.L. 98-473, Title II, §§ 223(a), 1005(a), Oct. 12, 1984, 98 Stat. 2028, 2138; Pub.L. 10-308, § 104(a), May 19, 1986, 100 Stat. 456; Pub.L. 99-570, Title I, § 1402, Oct. 27, 1986, 100 Stat. 3207-39; Pub.L. 100-649, § 2(b), Nov. 10, 1988, 102 Stat. 3817; Pub.L. 100-690, Title VI, §§ 6211, 6212, 6451, 6460, 6462, Title VII, §§ 7056, 7060(a), Nov. 18, 1988, 102 Stat. 4359, 4360, 4371, 4273, 4402, 4403. provides:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug office, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

STATEMENT

On or about April 7, 1988, the Appellant Mitchell Ray Leonard was arrested in Austin, Texas, within the Western District of Texas, and in his possession were found two 9 mm pistols.

On February 2, 1988 the Petitioner was indicted for violations of 18 U.S.C. 922(g)(1) and 924(e) for knowing and unlawful possession in commerce and affecting commerce of two firearms, one Browning, model Hi Power,

9mm pistol and one Smith and Wesson 9 mm pistol. It was further alleged in the indictment that the Petitioner had been previously convicted in the Courts of the State of Texas of three felonies, that is, two burglaries of a habitation and one burglary of a building.

The Petitioner filed a timely Motion to Dismiss (Record p. 125-128)[1] which requested the Court to dismiss the portion of the indictment which alleged a violation of 18 U.S.C. 924(e)(1), in that § 924(e)(1) was a sentence enhancement provision and did not constitute a separate criminal offense.

On April 22nd, after consideration of briefs and the arguments of counsel, the Court below entered an order granting the Petitioner's Motion to Dismiss (Record: p. 105-110) and which further provided that all

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[1]All citations to the record are to the official certified record. Copies of this record will be provided to the court, in full, should certiorari be granted.

portions of the indictment which alleged a violation of 18 U.S.C. 924(e)(1) were dismissed.

The remaining elements of the indictment which alleged a violation of 18 U.S.C. 922(g) remained in effect.

On April 29, the United States Attorney notified the Defendant and the Court of his intention to seek enhancement of any sentence imposed upon Mitchell Ray Leonard, after any conviction in the case, pursuant to the provisions of 18 U.S.C. 924(e) (Record: p. 79-80.)

On May 26, 1988 the Petitioner plead guilty to a violation of 18 U.S.C. 922(g) as alleged in the indictment, but requested of the Court the opportunity to brief and argue to the Court the suitability of sentence enhancement pursuant to 18 U.S.C. 924(e)(1).

On June 17, 1988, the Petitioner timely filed his Motion to Deny Enhancement of

Sentence and supporting brief (Record: p. 22-31). The U.S. Attorney filed his response to Petitioner's Motion on July 14, 1988. A hearing on the motion was held on July 15, 1988 at which time the Court denied the motion. An order was entered by the Court on July 19, 1980 (Record: p. 6-9).

On July 22, 1988 the Court sentenced the Petitioner to 15 years confinement for his violation of 18 U.S.C. 922(g) after enhancing the sentence pursuant to the provisions of § 924(e)(1). The Court's action was taken after receipt of a stipulation entered into by the United States of America and the Petitioner concerning three prior convictions under Texas law and in Texas Courts in 1975, 1976 and 1980 and the sworn testimony of the Petitioner concerning those offenses and convictions. Those convictions and offenses are more specifically described as follows:

1. Burglary of a habitation in Cause No. F 75-2354-JK on August 8, 1975 in Criminal District Court No. 4, Dallas County, Texas;

2. Burglary of a building in Cause No. F 76-5546-PK on July 30, 1976 in Criminal District Court No. 4, Dallas County, Texas; and

3. Burglary of a habitation in Cause No. F 79-11876-RK on February 14, 1980.

The Petitioner, although entering into the above referenced stipulation, specifically continued his assertion that the application of 18 U.S.C. 924(e)(1) to enhance his sentence for a violation of 18 U.S.C. 922(g) was unlawful and that the Court's denial of his Motion to Deny Enhancement was in error. The Court acknowledged the Petitioner's continuing position on this point. That assertion, which is the essence of this appeal will be discussed in greater detail hereafter.

Petitioner brought an action in the United States Court of Appeals for the Fifth Circuit seeking to have the enhanced sentence he

received pursuant at 18 U.S.C. 924(e) set aside. Jurisdiction of the Court of Appeals was established as an appeal as a matter of right. The Court of Appeals for the Fifth Circuit affirmed the opinion of the United States District Court for the Western District of Texas, upholding the sentence enhancement.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the interaction between state and federal criminal laws and the rights of criminal defendants in cases where the interaction of these laws fails to be clear. While this case is important to the petitioner, Mitchell Ray Leonard, it is also potentially important to any criminal defendant in Texas who is facing conviction and sentence enhancement pursuant to 18 U.S.C. 922(g) and 18 U.S.C. 924(e)(1). Pursuant to 18 U.S.C. 924(e)(1), enhancement of a sentence

issued for a violation of 18 U.S.C. 922(g) can occur when a person to be sentenced has been convicted of three prior convictions for a "violent felony." We will argue that the burglary convictions upon which Mitchell Ray Leonard's sentence enhancement was based were not at the time of the convictions, nor are they today considered to be violent crimes per se under the laws of the State of Texas. We would further urge that petitioner's sentence to fifteen years confinement pursuant to 18 U.S.C. 924(e)(1) is not lawful and should be set aside because the burglaries for which petitioner was convicted did not involve "violent crimes" as required by the statute. At least one United States Court of Appeals Judge appears to concur in the opinion that this issue is ripe for Supreme Court Review. Senior Circuit Judge Bright is U.S. v. Taylor, 864 F.2d 625, 630 (8th Cir. 1989), noted that:

> "neither this panel nor this writer need uncritically accept a prior panel opinion which may be flawed. I suggest the rule

> of this case and Portwood in deciding that every burglary defined under state law qualifies as a 'violent felony' pursuant to 18 U.S.C. § 924(e)(2)(B)(ii) needs re-examination by this court in banc or by the United States Supreme Court."

We will also argue that federal circuit courts have recognized the application of the state law definition of burglary to the offenses undefined in 18 U.S.C. 922(g), noting that the Congress, in failing to define crimes such as violent burglary, left these definitions up to the individual state jurisdiction. We will also argue that the Federal Circuits disagree with respect to the type of burglary sufficient to sustain sentence enhancement. Furthermore, even if the Congressional action was not entirely invalid, because some Texas burglary convictions presumably are for burglary offenses which do, in fact, involve violence or threat of violence, there must, at a minimum, be evidence supporting the conclusion

by the sentencing court that the defendant's convictions were for offenses which did involve violence. The record in this case, does not support the finding that petitioner's three prior convictions contained the violence or potential violence requisite as either a matter of law or a matter of fact, therefore we would argue that they cannot be used to support sentence enhancement under 18 U.S.C. 924(e)(1). Furthermore, we would also argue that Congress, by enacting this statute in 1986, sought to redefine the nature of petitioner's previous criminal convictions in a manner violative of his due process rights.

We argue that the petitioner's three prior offenses are not the nature of offenses to which the Armed Career Criminals Act was intended to apply. The legislative history of the Act indicates that it was intended to strike at the "worst and most deserving" criminals. 130 Cong. Rec. § 1559 (daily ed.

Feb. 23, 1984). This suggests that the intent of enhancement was to punish those who were guilty of far more than the general run of property offenses. The three convictions which support Mitchell Ray Leonard's sentence enhancement were for:

> (1) Burglary committed during the day, three months after his seventeenth birthday where he and another neighborhood minor stole a television, stereo and a few other items, most of which were subsequently returned.
>
> (2) Burglary of a building with a neighbor where Leonard was caught while still outside the building.
>
> (3) An arrest for attempting to use a stolen credit card to buy a pair of sunglasses. He was subsequently charged with burglary of a habitation and credit card abuse. Leonard maintains, and there is no evidence to suggest otherwise, that that card was obtained from someone else.
>
> Transcript of Proceedings, United States District Court for Western District of Texas, Austin Division, 7/22/88 at 23-24.

While it is clear that Leonard is indeed a repeat offender, the offenses which he has committed are not what could be or should be

classed as violent crimes. There is no apparent threat to any person from Leonard's actions. Nor are they sufficiently "criminal" to support application of the Armed Career Criminals Act. The legislative history of the Act indicates that its intended application was against those who commit violent or serious crimes, while not demeaning the seriousness of any criminal act, our prison system does not have the room or the resources to sustain criminals like Leonard for a minimum of fifteen years without parole based upon these types of convictions. We would ask that the court consider the intent and application of the Act in this case.

1. The United States Court of Appeals for the Eighth Circuit has considered the ambiguous status of "burglary" as defined in 18 U.S.C. 924(e). In United States v. Portwood, 857 F.2d 1221 (8th Cir. - 1988), reh'g and reh'g in banc den'd 12/13/88, the court considered

how burglary should be defined for the purpose of the statute. The appellants, in that case, attempted to argue that the "burglary" ambiguity required a resort to the legislative history in order to determine whether § 924(e)(2)(B)(ii) could be properly applied to burglary second degree under Missouri law. The court failed to concur with the appellant noting that "we find very little ambiguity on the face of the statute and, thus, no occasion to explore the legislative history." Supra at 1223. In holding that the intent and application of § 924(e) was clear, the court held "In our view, the statute says 'burglary,' and we take that to mean 'burglary,' however a state may choose to define it." Supra at 1224.

Texas case law recognizes the precept that not all felonies involve an act of violence or threatened violence as a matter of law. Certain felonies in Texas may involve

violence, but the existence of violence with respect to the commission of these felonies is not established per se. Hamilton v. State, 678 S.W.2d 90, 91 (Tex. App. - Eastland [11 Dist. - 1983). The determination of whether an individual felony offense involved an act of violence must depend on the facts and circumstances of each case. Schutz v. State, 646 S.W.2d 224 (Tex. Crim. App. 1983). These Texas cases recognize that the government in their indictment must allege and in the trial must prove that the felony involved an act of violence or threatened violence sufficient to meet statutory requirements.

The Texas Supreme Court, in the early case of State v. Robertson, 32 Tex. 159, __ (1869), concluded that while burglary by breaking did imply some level of force "it does not contemplate such force as would be denominated violence." The Texas courts have long held that burglary is not a crime of violence per

se; therefore, the violent nature of a burglary must be proved in every case where it is alleged. As Texas courts will not imply violence where it did not actually exist, it is incumbent upon the government to prove that the burglary offenses in question involved violence or threatened violence as alleged. Schutz v. State, 646 S.W.2d 224 (Tex. Crim. App. 1983). In Tew v. State, 551 S.W.2d 375, 378 (Tex. Crim. App. 1977) rehrg den'd, the court held that "[b]urglary does not per se involve violence, and whether a felony offense does involve violence must depend on the facts and circumstances of each case." See Gardner v. State, 699 S.W.2d 831 (Tex. Crim. App. 1985) (op. on reh'g) (holding that burglaries are not presumed to be crimes of violence), see also Powell v. State, 538 S.W.2d 617 (Tex. Crim. App. 1976). In Hill v. State, 748 S.W.2d 314, 315 (Tex. App.--Houston [1st Dist] 1988), the court

recognized the importance of obtaining evidence as to the violent nature of the underlying crimes, noting that a presumption of violence was not legally sufficient.

The court in Gardner v. State, supra at 836, considered the Texas habitual offender statute and the sufficiency of prior burglary offenses. The defendant, in this case, was convicted of possession of a firearm by a convicted felon pursuant to Texas law. Included among the elements of this offense was the requirement that the accused must have previously been convicted of a felony involving an act of violence or threatened violence. At issue was whether the accused prior burglary conviction was sufficient to sustain this burden.

The court found that, in order for the conviction to stand, the state was required to prove that the prior burglary conviction involved threatened violence or an act of

violence in that case. The opinion adheres to the rule of law in Texas which recognizes that burglary is not, per se, a crime of violence. The court in the Gardner case held "[w]e now reaffirm this holding and state unequivocally that proof sufficient to establish 'breaking' in a burglary prosecution under our former penal code, see V.A.P.C. Articles 1389 et seq., 1404b, does not automatically establish violence to property under § 46.05." Gardner, supra at 836. Under the Gardner holding, burglaries are not presumptively crimes of violence sufficient to support convictions pursuant to repeat or habitual offender enhancement statutes unless a separate showing by the prosecutor of violence has been made. See also Renteria v. State, 703 S.W.2d 329, 333-34 (Tex. App.--Corpus Christi [13 Dist.] 1985, no pet.).

Indeed, the Texas courts, in construing the state's repeat offender statute, have

noted that "whether a felony offense is within the scope of this statute must depend on the facts and circumstances of each case." Powell v. State, 538 S.W.2d 617, 619 (Tex. Crim. App. 1976). We argue that it was incumbent upon the Government to prove up the "act of violence" as alleged in the indictment. Further, we argue that these acts of violence should have been properly set out in the indicting document. See Cathy v. State, 402 S.W.2d 743 (Tex. Crim. App. 1966). Simply alleging that violence was involved should not be sufficient to uphold a fifteen year conviction. The sweeping applicability of § 924(e)(1) should not and cannot be allowed to override the state law definitions which control, and Texas State law has refused to define burglary as violent per se. See U.S. v. Portwood, supra.

Because federal appellate courts have bowed to the state law definition and because

Texas state courts have refused to define burglary as violent per se, we argue that defendant's conviction pursuant to 18 U.S.C. 922(g) and 18 U.S.C. 924(e)(1) should be overturned.

2. The United States Courts of Appeals are not in agreement on the definition of burglary applicable to 18 U.S.C. 924(e)(1). This statute provides for sentence enhancement in instances where a felon with three or more previous convictions for a violent felony or serious drug offense is found to be in possession of a firearm. This statute fails to provide any definition of burglary. The various Courts of Appeals differ as to what definition of burglary should be applied. We would urge that the common law definition of burglary should be the one applicable.

Dissenting Senior Circuit Judge Bright in U.S. v. Taylor, 864 F.2d 625, 627 (8th Cir. 1989), recognized that § 924(e) failed to define burglary. Noting that:

> "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1931).

We will argue that the common or established meaning of "burglary" should only encompass the common law definition because the meaning of "burglary" does fluctuate wildly among jurisdictions. The only sure and universal meaning is the common law definition. As Judge Bright noted:

> "[m]odern statutes setting out offenses denominated as burglary may or may not possess the common law elements of burglary. As such, burglary does not have an established 'modern' meaning. Moreover, no language in the enhancement statute dictates a meaning other than the common law meaning." Taylor, supra at 627; see W. Lafauc and A. Scott, Jr., Criminal Law 792 (2d. ed. 1986).

We would urge that the legislative history, thorough legal research and sound legal reasoning would support the application of the common law burglary definition. The

common law defines burglary as "breaking and entering the house of another in the nighttime, with intent to commit a felony therein, whether the felony be actually committed or not." BLACKS LAW DICTIONARY, 247 (4th Ed. 1951); see also Soders v. State, 81 Tex. Cr. R. 506, 195 S.W. 1146, 1147 (_____). This is the definition which should be applied to this Act.

The United States Court of Appeals for the Fourth Circuit has considered how burglary should be defined for the application of 18 U.S.C. 924(e)(1). The Fifth Circuit, in the Leonard opinion, refused to consider what definition of burglary applied. The Fifth Circuit court, in not applying either the Texas nor the common law definitions of burglary, reasoned that any burglary was sufficient to constitute a violent crime. We would like to argue that this conclusion is mistaken in fact and in law. In determining

what construction to give the word "burglary" used in § 924(e)(1), it is necessary to look to the definition of "violent felony" defined in the statute. Section 924(e)(2)(B) defines violent felony as:

> any crime punishable by imprisonment for a term exceeding one year that -
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The Fifth Circuit refused to consider the application of this statute to the broad range of "burglary" violations and concluded simply that all burglaries fall within this purview. The Fourth Circuit persuasively argued that the statutory language at issue is sufficiently ambiguous to require resort to interpretive sources and canons.

The Fourth Circuit in U.S. v. Headspeth, 852 F.2d 753, 765 (4th Cir. 1988), considered whether a defendant's prior conviction for storehouse breaking was sufficiently violent to support sentence enhancement under § 924(e)(1), "Storehouse breaking" is defined in Maryland law as:

> breaking (into) a storehouse, filling station, garage, trailer, cabin, diner, warehouse or other outhouse or into a boat in the day or night with an intent to commit murder or felony therein, or with the intent to steal, take or carry away the personal goods of another of the value of $300 or more therefrom...

The Fourth Circuit, in holding that Storehouse breaking was not a sufficiently violent offense to support sentence enhancement, noted that:

> Quite plainly, this offense is not the sort of "violent felony" referred to in § 924(e)(2)(B)(i), for it does not have an element the use - actual, attempted, or threatened - of force against the person.

The court came to this conclusion by considering Congressional intent. Noting

that, as this Honorable Court has previously ruled, when Congress uses a common law term such as burglary without otherwise defining it, Congress is presumed to have adopted the meaning given the term at common law. Morrissette v. United States, 342 U.S. 246, 263 (1952). The Headspeth court stated that if burglary, as used in 18 U.S.C. 924, is defined in this manner, then storehouse breaking is not included in the offense because it is not required to take place at night or to invade the dwelling house of another. Indeed, if the use of the word "burglary" in § 924 is limited to the definition of common law burglary, then only burglaries of dwelling houses will be violent per se.

The government, in Headspeth, sought to argue that the legislative history and the purpose of the sentence enhancement provision demonstrate that Congress intended a broader

reading of burglary than that a common law. The scope of the Act was the subject of much Congressional debate and the final version of the bill overrode another version which contained a broader definition of burglary. This rejected provision would have ensured a reading of burglary which was broader than the common law definition. See Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 44 (May 21, 1986). Other rejected provisions would have allowed sentence enhancement for a broad range of property crimes. H.R. 4639, 99th Cong., 2d Sess. (1986). Because other proposed amendments sought to require that the underlying offense require force or attempted force against the person of another, the final version of this Act sought to bridge the gap between those who would include a broad range of property

crimes and those who would require actual physical violence against a person. United States v. Sherbondy, 865 F.2d 996, 1007 (9th Cir. 1988).

The court in U.S. v. Chatman, 869 F.2d 525, 528 (9th Cir. 1989), concluded that the overwhelming impression created by the legislative history and structure of § 924(e) indicated that "Congress intended 'burglary' to be a crime of particular danger to the person, and not to include all of the common property offenses that states might choose to denominate as burglary. As we said in Sherbondy, the provision as finally enacted includes four specific categories of property crime, each of which Congress believed involves conduct which poses a particularly serious 'risk of injury to another.'"

The Headspeth court noted that while at one time a broader reading was encompassed in

§ 924(e), the Congress repealed this definition of burglary. That court held that:

> Though the amended statute lists burglary as a predicate offense, it specifically deletes the broad definition of that term which had appeared in the original version of the statute. This omission, viewed in light of the efforts to remove burglary altogether from the list of predicate offenses, suggests that Congress intended to revert to the narrow common law definition of burglary in the amended statute. The common law definition is, to be sure, more consistent with the amended statute's focus on conduct which poses a serious risk of injury to the person. Absent more persuasive evidence that Congress intended the term "burglary" in amended § 924(e)(2)(B) to mean something else, we are reluctant to depart from the usual presumption that Congress intended the term to be given its common law meaning. Accordingly, we hold that the term "burglary," as used in § 924(e)(2)(B)(ii), means the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit a felony therein.
>
> Supra at 758.

Headspeth recognized the possibility that storehouse breaking could, in some instances, present the type of criminal situation which

might present some risk of injury to a person. However, the court reasoned that the crime was not one which, by its very nature, posed such a risk. Supra at 758-59.

The court recognized that this case presented a close issue but reasoned that the rule of lenity required a narrow reading of the statute. Pursuant to the well-established principle of statutory construction, which dictates that ambiguities in criminal statutes must be resolved in favor of lenity for the accused, the court found that the common law definition should be applied, absent any additional evidence to the contrary. United States v. Bass, 404 U.S. 336, 347 (1971); Rewis v. United States, 401 U.S. 808, 812 (1971). As this court has stated, "[t]his policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be

based on no more than a guess as to what Congress intended." Ladner v. United States, 358 U.S. 169, 178 (1958). In United States v. Gilbert, 813 F.2d 1523, 1526 (9th Cir.) cert. denied, _____ U.S. _____, 108 S.Ct. 173 (1987), the court found that, because a penal statute was involved, the Act should be strictly construed in favor of the accused. See United States v. Kelly, 527 F.2d 961, 964 (9th Cir. 1976).

A penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983), § 924(e) does not provide a definition of the offense which is sufficiently definite to warn ordinary people with respect their conduct. If the Armed Career Felon's Act can indeed include

convictions for little more than credit card abuse among those offenses sufficient to support sentence enhancement, then the terms of § 924(e) are not only unclear they are actually misleading.

The Courts of Appeals, themselves, are in disagreement as to how the term burglary should be construed for application of the statute. Because it appears safe to assume that the Courts of Appeals have a higher level of sophistication than an "ordinary person" and the opinions of the courts indicate that the term is sufficiently indefinitely defined so as to confuse the Courts, we urge that, burglary as defined, is not sufficiently definite so that ordinary people could understand the meaning which Congress intended. Therefore, we would urge that the statute be construed with lenity, in the favor of the accused, and that the conservative common law burglary definition be applied.

This is the only statutory construction which would not encourage arbitrary and discriminatory enforcement.

Furthermore, the Fifth Circuit's attempt in Leonard, to accord Headspeth and their holding must fail because a legal argument based upon such purely semantic reasoning should have no merit. The court argues:

> In Headspeth the court held that a state offense not denominated 'burglary' is not burglary within the meaning of 924(e)(2)(B)(ii) unless the state offense fits within the common law definition of burglary.
>
> Headspeth Supra.

We do not believe that this argument presents a legally sufficient explanation for distinguishing these two cases. The court simply refused to recognize that a spade was a spade, no matter what it is labeled. Storehouse breaking as defined by the Maryland statute was sufficiently similar to the Texas conviction for burglary of a building to warrant comparison. The Fifth Circuit refused to consider this close issue.

While we wholeheartedly agree with the court that certain petty offenses should be distinguished from burglary, the argument that storehouse breaking, defined as the "breaking [into of] a storehouse, filling station, garage, trailer, cabin, diner or warehouse..." is likened in some way to the Texas offense of Burglary of Coin-Operated or Coin Collection Machine is patently unsupportable. Storehouse breaking encompasses the breaking into of various buildings and businesses similar to the Texas offenses of burglary of a building and bears no resemblance to the admittedly lesser petty offense of burglarizing a coin-operated machine.

Furthermore, in likening the offenses of storehouse breaking and burglary of a coin-operated machine the Fifth Circuit was grouping offenses which in actuality have little in common. Storehouse breaking is a felony in Maryland while burglary of a

coin-operated machine is a misdemeanor in Texas. It is interesting that the court, implicitly notes its own mistake, by recognizing that Headspeth's storehouse breaking involved an activity that was in actuality more violent than any of Leonard's convictions. Headspeth gained entry to a jewlery store by throwing a brick through a plate glass window. This act is apparently more violent than any of the acts committed by Leonard. However, the existence of violence and a potential threat to the lives and well being of citizens, in fact, is not of interest to the Fifth Circuit because the label of the crime does not contain the word burglary. This whole analogy must fail because it is simply unsupportable.

In the dissenting opinion in U.S. v. Taylor, 864 F.2d 625, 628 (8th Cir. 1989), Judge Bright argued that "[t]he majority ...subjects Taylor to the enhanced penalty

because the state labeled his conduct burglary following the majority's analysis to its logical conclusion, a traffic offense of wrongful parking; i.e., the taking of someone else's privilege of using a parking space, if labeled burglary by a state, could be used to enhance a sentence under section 924." This dissenting judge expressed the opinion that the application of a federal sentencing provision should not turn on the label given certain conduct by the various states. Noting that such an application would unconstitutionally treat similarly situated persons in different ways for the purposes of the federally imposed sentence.

This Federal Act must be interpreted in a uniform manner so as to ensure equal protection and equal application of federal law. Because uniform application is requisite, in the absence of a federal congressional definition for § 924(e) the only

available definition is the common law definition of burglary.

The Ninth Circuit, in the case of U.S. v. Chatman, 869 F.2d 525, 527 (9th Cir. 1989), recently considered whether "auto burglary" was sufficient to sustain sentence enhancement under the Armed Career Criminals Act. The court, following Headspeth, recognized the importance of not creating an inner circuit conflict on this issue. In adopting the Headspeth reasoning, the Chatman court held that "by leaving the term burglary undefined, Congress intended it to have its common law meaning. "'Burglary' therefore means the breaking and entering of the dwelling house of another, in the nighttime, with the intent to commit felon therein." Chatman, supra at 527.

The Chatman court, went on in dicta, to comment on the rationale for including burglary among those violent offenses sufficient for sentence enhancement under the

Armed Career Criminals Act. The court noted that "[b]urglary is entirely out of place in that list unless it is defined so that it describes a crime engendering serious risk of injury to persons." The court noted that simply the threat that a crime could possibly end in violence, was not sufficient to label every property crime violent per se. Such a definition would lead to construing every offense as a violent one. Indeed, the Chatman court recognized that the common law burglary definition would be the best suited to ensure that the purpose of the Armed Career Criminals Act is carried out. The court noted that the common law definition struck at the "worst and most deserving criminals" while avoiding such "bizarre results" as enhancement for such crimes as shoplifting. Supra at 529.

We urge the court to embrace the Ninth Circuit definition of burglary. Upon reviewing the legislative history, the common

law definition of burglary is the definition which best adheres to the intent of the legislature. We argue that the Fifth Circuit's refusal to consider legislative history resulted in an improper decision. We agree with Judge Bright's dissenting opinion in U.S. v. Taylor, 864 F.2d 625, 629 (8th Cir. 1989) that the legislative history of this statute clearly indicates that burglary should be narrowly construed for the purposes of § 924(e). As the Headspeth court noted:

> Though the amended statute lists burglary as a predicate offense, it specifically deletes the broad definition of that term which had appeared in the original version of the statute. This omission, viewed in light of the efforts to remove burglary altogether from the list of predicate offenses, suggests that Congress intended to revert to the narrow common law definition of burglary in the amended statute. The common law definition is, to be sure, more consistent with the amended statute's focus on conduct which poses a serious potential risk of injury to the person. Absent more persuasive evidence that Congress intended the term "burglary" in amended § 924(e)(2)(B) to mean something else, we are reluctant to depart from the usual presumption that Congress intended the term to be given its common law meaning.

Headspeth, 852 F.2d at 757-58. We further argue that the Fifth Circuit opinion on this matter should be set aside and the common law definition of burglary adopted.

3. The Appellant, in the Court below, stipulated that he was convicted in the Courts of the State of the following offenses under Texas law:

1. Burglary of a habitation in Cause No. F 75-2354-JK on August 8, 1975 in Criminal District Court No. 4, Dallas County, Texas;

2. Burglary of a building in Cause No. F 75-5546-PK on July 30, 1976; and

3. Burglary of a habitation in Cause No. F 79-11876-RK on February 14, 1980 in Criminal District Court No. 4, Dallas County, Texas.

In 18 U.S.C. 924(e)(2)(B), enacted by the United States Congress in 1986 as Public Law 99-570 § 1402(b), the Congress has provided a definition of "violent felony" which provides in pertinent part as follows:

> . . . the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that . . .

(ii) is burglary . . .

By enacting this statute, the U.S. Congress, in 1986, has sought to define all burglaries, including those for which Appellant was convicted, as "violent" felonies.

The question should be asked and answered whether or not this after the fact characterization of the Appellant's convictions is in violation of defendant's constitutional rights.

This is so because, if the Appellant's burglary offenses and convictions are considered "violent" felonies in the jurisdiction in which they occurred, then the Congressional definition of them as "violent felonies" is superfluous since they will independently serve as support for sentence enhancement pursuant to 18 U.S.C. 924(e)(1).

If the Appellant's burglary offenses and convictions are not considered "violent"

felonies under the law of the jurisdiction in which they occurred, then the Congressional definition of them as "violent" felonies is at odds with the law under which the convictions were obtained and amounts to an "after the fact," retrospective change in the elemental character of the Appellant's criminal conduct and resulting convictions.

Such a retrospective change would result in the deprivation of the petitioner's due process rights because the Congress, by imposing their own characterization on petitioner's prior offenses without review would in affect redefine the nature of these prior convictions. Given that the law of the jurisdiction where the offenses took place does not recognize burglary as violent per se, the recharacterization of these offenses as violent per se by Congress and the application of these recharacterized offenses to petitioner serves to deprive him of due

process of law as guaranteed in the Fifth Amendment of the Bill of Rights of the United States Constitution. The Fifth Amendment recognizes that no person may be deprived of life, liberty or property without due process of law. We would argue that the recharacterization of petitioner's offenses, without reopening and examining the specific nature of each offense, deprives petitioner of his due process privileges.

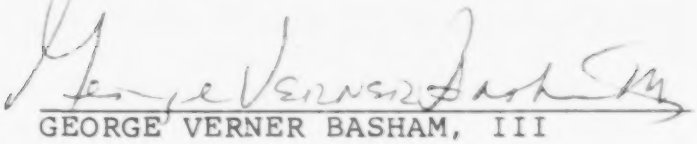
CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted. By the clear terms of 18 U.S.C. 924(e)(1) petitioner did not commit three violent felonies sufficient to sustain a sentence enhancement. We urge that the Fifth Circuit erred in adopting such a broad interpretation of burglary which is in direct conflict with the principles of levity

and statutory construction as promulgated by this Honorable Court.

The burglary convictions relied upon by the Fifth Circuit Court and the District Court are insufficient to support sentence enhancement for several reasons. They are not violent crimes per se in the jurisdiction where they arose, the burglary of a building and habitations during the daytime are not sufficient to constitute burglary for the purposes of sentence enhancement under 18 U.S.C. 924(e) because said convictions do not meet the common law definition of burglary as established by the court which should be the requisite definition for sentence enhancement purposes, and that there is no evidence which supports that any of these burglaries were violent in fact. We respectfully request that this court sustain this petition for certiorari.

Respectfully submitted,



GEORGE VERNER BASHAM, III
Attorney for Petitioner

May 1989

APPENDIX

APPENDIX A

United States Court of Appeals,

Fifth Circuit.

March 20, 1989.

PATRICK E. HIGGINBOTHAM,

Circuit Judge:

Mitchell Ray Leonard pled guilty to being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court enhanced his sentence pursuant to 18 U.S.C. § 924(e)(1), which provides for a fifteen year minimum sentence for those who violate § 922(g) and have three prior convictions for violent felonies. Leonard contends that the trial court erred by enhancing his sentence on the basis of his three Texas burglary convictions, and also argues that § 924(e) constitutes an unconstitutional ex post facto law. We affirm the sentence imposed by the trial court.

I.

Leonard was indicted for being a three-time convicted felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). Pursuant to Leonard's motion, the trial court dismissed those portions of the indictment alleging a separate violation of § 924(e)(1). The trial court correctly ruled that § 924(e)(1) was a sentence enhancement provision rather than a separate offense.[1] The government then noticed its intent to seek enhancement of Leonard's sentence pursuant to § 924(e)(1) based on his three prior convictions for burglary in Texas.

Leonard pled guilty to possessing a firearm in violation of § 922(g)(1), but moved to deny enhancement of his sentence under § 924(e)(1) on grounds that his burglary convictions were not "violent felonies" as

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[1]This issue was recently resolved in United States v. Affleck, 861 F.2d 97 (5th Cir. 1988) (§ 924(e)(1) is penalty enhancement provision rather than a separate substantive offense).

required by that provision. The parties stipulated that on August 8, 1975 and February 4, 1977, Leonard had been convicted of burglary of a habitation, and that on July 30, 1976, he had been convicted of burglary of a building. The government produced certified copies of these convictions. After a hearing, the trial court denied Leonard's motion. Leonard was later sentenced to fifteen years incarceration pursuant to § 924(e)(1).

II.

Leonard does not challenge his conviction under § 922(g)(1). His sole contention on appeal is that the trial court erroneously enhanced his sentence pursuant to § 924(e)(1).

Section 924(e)(1) provides, in relevant part, that:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years . . . .

18 U.S.C. § 924(e)(1) (Supp. 1988) (emphasis added.) "Violent felony" is defined at section 924(e)(2)(B), which reads:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that -
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B) (Supp. 1988) (emphasis added).

The trial court enhanced Leonard's sentence under § 924(e)(1) based on his three Texas burglary convictions. Leonard argues that this was error.

Leonard contends that § 924(e)(2)(B) defines as "violent felonies" only those offenses which involve actual or potential

physical injury to others. He argues that since the offense of burglary in Texas includes a variety of non-violent crimes, not all Texas burglary convictions come within the purview of § 924(e)(2)(B)(ii).[2] He claims that the trial court erred by enhancing his sentence without first analyzing the specific conduct underlying his burglary convictions to determine whether they involved actual or potential physical injury to others.

The government responds that in § 924(e)(2)(B)(ii) Congress made the determination that certain enumerated property crimes, including burglary, were offenses which involved potential physical injury to others. The government argues that the trial court need only consider such prior offenses in their generic sense, without looking at the underlying conduct to determine whether it involved the risk of violence.

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[2]"Burglary" is defined at common law as breaking and entering the dwelling house of

We begin with the plain language of the statute. See United States v. Turkette, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). "If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" Turkette, 452 U.S. at 580, 101 S.Ct. at 2527.

Section 924(e)(2)(B)(ii) defines "violent felony" as any crime that "is burglary, arson, or extortion . . ., or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). We read

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another, in the nighttime, with the intent to commit a felony therein. Texas has expanded this definition to include burglary of a habitation, building, coin-operated machine, or of a vehicle. Tex. Penal Code Ann. §§ 30.01-30.05 (Vernon 1989).

the clear language of the statute to designate these enumerated property crimes as "violent felonies" for purposes of sentence enhancement, without regard to whether the underlying conduct involved actual or potential violence. The plain language of subsection (ii) reflects Congress' determination that these property crimes present an inherent risk of violence. Leonard's construction of the statute, that actual or potential violence must also be established, renders superfluous the language in the first clause of subsection (ii). We have held that "'a statute should not be construed in such a way as to render certain provisions superfluous or insignificant.'" Woodfork v. Marine Cooks and Stewards Union, 642 F.2d 966, 970-71 (5th Cir. 1981).

Two circuits have recently rejected similar challenges to sentence enhancement under § 924(e)(1) based on the plain language

of the statute. In United States v. Dickerson, 857 F.2d 414, 418-19 (7th Cir. 1988), the Seventh Circuit rejected an appellant's argument that his three prior burglary convictions did not qualify as "violent felonies" because he was unarmed when he committed them. After reviewing the language of the statute, the court concluded:

> It is clear from the language of the statute that all burglaries satisfy the prerequisites of § 924. As the trial judge correctly noted, if Congress intended to include only crimes in which serious physical injury was involved, it would have worded the statute to say "burglary, arson, or extortion, and involves use of explosives or otherwise involves conduct that presents a serious risk of physical injury to another.

857 F.2d at 419 (emphasis in original).

Similarly, in United States v. Portwood, 857 F.2d 1221 (8th Cir. 1988), the Eighth Circuit rejected appellants' claim that their prior convictions for second-degree burglary under Missouri law did not justify enhanced punishment under § 924(e)(1).[3] While

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[3]Missouri defines second degree burglary

conceding that the definition of "violent felony" at § 924(e)(2)(B) included "burglary," appellants argued that the meaning of that term was ambiguous since the statute did not define it. The court disagreed, stating:

> [W]e find very little ambiguity on the face of the statute and, thus, no occasion to explore the legislative history. In our view, the statute says "burglary," and we take that to mean "burglary," however a state may choose to define it. Congress could quite reasonably conclude that no matter what the felon's intent upon breaking in, the property owner may return, a neighbor may investigate, or a law enforcement official may respond. All of these scenarios present a grave threat of harm to persons. A person with three prior convictions for burglary, regardless of the details of each burglary, presents the type of potential threat to society that Congress sought to control by the enactment of § 924(e).

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as "knowlingly" enter[ing] unlawfully or knowlingly remain[ing] unlawfully in a building or inhabitable structure for the purpose of committing a crime therein." Mo. Rev. Stat. § 569.170.1. As a felony, second degree burglary is punishable by imprisonment for a term exceeding one year. Mo. Rev. Stat. § 556.016.2.

857 F.2d at 1223-24. Accord United States v. Taylor, 864 F.2d 625 (8th Cir. 1989) (rejecting argument that second degree burglary is improper basis for sentence enhancement because, unlike first degree burglary, it involves no potential for violence).

We find further support for our conclusion in the Ninth Circuit's recent decision in United States v. Sherbondy, 865 F.2d 996 (9th Cir. 1988). In that case, the Ninth Circuit considered whether a prior conviction for preventing or dissuading a witness from testifying qualified as a "violent felony." As part of its inquiry, the court considered whether that offense fell within the scope of § 924(e)(2)(B)(ii) as a crime which "otherwise involves conduct that presents a serious potential risk of physical injury to another." The court conducted an exhaustive inquiry into the legislative history of the statute to

determine whether subsection (ii) contemplates an inquiry into the specific conduct underlying the prior conviction or whether the court should consider the offense only in its generic sense.

> One conclusion we draw from our review of the legislative history is that Congress consistently discussed subsection (ii) in categorical terms: i.e., in terms of what offenses it would include. There is no indication that Congress intended that a particular statutory or common law crime would in some circumstances constitute a violent felony and in other circumstances not, depending upon how the offense was committed. The first part of subsection (ii) sets forth specific property offenses that Congress expressly wanted to cover: that part, like subsection (i), is clearly categorical; a burglar, for example, cannot claim as a defense that his or her particular conduct was non-violent.

865 F.2d at 1008.

The Ninth Circuit went on to hold that when determining whether a prior offense is a "violent felony" under either subsection of § 924(e)(2)(B), the trial court should consider only the fact of conviction and the statute establishing the crime. The court

concluded that sentence enhancement was appropriate when, and only when, the statutorily defined crime fits within one of the categories of offenses listed in § 924(e)(2)(B). Sherbondy, 865 F.2d at 1009-1010. An offense comes within the ambit of subsection (ii) if the offense is denominated by one of the labels specifically enumerated or if the generic offense described in the statute fits the catch all "otherwise" category of that subsection.

As the Ninth Circuit has noted, requiring trial courts to conduct a factual inquiry into the specific conduct underlying a prior offense presents several difficulties. See Sherbondy, 865 F.2d at 1008. Evidentiary hearings would often require testimony about events many years past by witnesses who may no longer be available. Even if the court were to limit its inquiry to court records, substantial problems would arise where, as in

Leonard's case, prior convictions are based on guilty pleas and little or no record has been developed. In view of the absence of any statutory authorization or guidance as to the manner and scope of such an inquiry, we doubt that Congress intended the trial court to inquire into the specific conduct underlying each prior offense. See United States v. Vidaure, 861 F.2d 1337, 1340 (5th Cir. 1988) (determination of whether prior offense is a violent felony for purposes of § 924(e) does not involve examination of particular defendant's conduct).

(1) We therefore conclude that when considering whether a prior conviction falls within the categories of property crimes specifically mentioned in subsection (ii), the trial court must limit its inquiry to the fact of conviction and whether the prior offense, as denominated by the statute, comes within one of those categories of offenses.

Our interpretation of the multiple offender statute implies that those convicted of similar crimes in different states may be treated differently if the states denominate the crimes differently. This apparent anomaly is, however, a necessary incident to a statute that varies punishment on the basis of past convictions, and on the basis of the character of the crimes for which the defendant was convicted, rather than on the basis of the defendant's specific behavior. As the text of the statute makes clear, Congress determined that it would be most practical to assess sentences on the basis of past convictions, rather than on the basis of underlying behavior. By deferring to state convictions and state law characterizations of offenses, Congress favored administrative practicality over uniformity. We have no warrant to re-weigh this choice.

In any event, if the various state statutes defining burglary are not entirely congruent, neither are they entirely divergent. States do not arbitrarily denominate crimes "burglary." Rather, the names of the crimes reflect a general understanding of the crime, a common ground that will soften the uneven impact of the federal repeat offender statute.

An additional circumstance reduces any disparities. A prior burglary conviction qualifies as a "violent felony" for purposes of sentence enhancement only if the conviction was for a "felony" that is "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(e)(2)(B). This limitation will preclude sentence enhancement based upon petty offenses that the state denominates burglary. For example, Tex - as recognizes as an offense "Burglary of Coin-Operated or Coin Collection Machines." See Tex. Penal Code

Ann. § 30.03 (Vernon 1989). This offense, however, is not a felony. It is a Class A misdemeanor. Id. at § 30.03(c). As such, it does not come within § 924(e)(2)(B)'s definition of "violent felony."

Our holding today is in no respect inconsistent with that of the Fourth Circuit in United States v. Headspeth, 852 F.2d 753 (4th Cir. 1988). In Headspeth, the court held that a state offense not denominated "burglary" is not burglary within the meaning of § 924(e)(2)(B)(ii) unless the state offense fits within the common law definition of burglary. We, unlike the Headspeth court, deal with an offense denominated "burglary" by the state of Texas. Headspeth is distinguishable.

Headspeth involved a prior conviction for "storehouse breaking," an offense similar to burglary, but not so defined by the Maryland statute.[4] The court considered whether that

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[4]Maryland defines "storehouse breaking"

prior conviction could serve as the basis for sentence enhancement on grounds that it was a form of "burglary" within the meaning of subsection (ii). The court found that since § 924(e) did not define the term "burglary," it was bound by the canon of interpretation that when Congress uses a common law term and does not otherwise define it, the presumption is that Congress intended to adopt the meaning of the term at common law. Headspeth, 852 F.2d at 757 (citing Morissette v. United States, 342 U.S. 246 263, 72 S.Ct. 240, 249-50, 96 L.Ed. 288 (1952)).

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as "breaking [into] a storehouse, filling station, garage, trailer, cabin, diner, a warehouse or other outhouse or into a boat in the day or night with an intent to commit murder or felony therein, or with the intent to steal, take or carry away the personal goods of another of the value of $300 or more therefrom . . . ." Md. Ann. Code art. 27, § 32 (1987).

An earlier version of the statute,[5] 18 U.S.C. § 1202(a), resting sentence enhancement on prior convictions for robbery or burglary, contained a broad definition of burglary.[6] When Congress amended the statute in 1986 to expand the list of predicate offenses to "violent felonies" and "serious drug offenses," it retained burglary as a predicate

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[5]The provisions contained in § 924(e)(1) were previously codified at 18 U.S.C. App. § 1202(a), which prohibited previously convicted felons form receiving, possessing, or transporting in commerce, or affecting commerce, any firearm. Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351, § 1202(a), 82 Stat. 197, 236 (1968). In 1984, Congress amended Section 1202(a), adding an increased penalty for felons with three previous convictions for robbery or burglary who subsequently possessed firearms. Armed Career Criminal Act of 1984, Pub.L. 98-473, § 1202(a), 98 Stat. 2185 (1985). In 1986, Congress repealed § 1202(a). The Armed Career Criminal Act was then amended and recodified at 18 U.S.C. § 924(e), as part of a general consolidation of the federal firearms laws. Firearms Owners' Protection Act, Pub.L. No. 99-308, 100 Stat. 456 (1986).

[6]The Act defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in

offense but deleted the broad definition of that term present in the former statute. 18 U.S.C. § 924(e). The Fourth Circuit concluded that Congress' failure to define burglary in the amended statute, when viewed in light of earlier proposals aimed at removing burglary from the list of predicate offenses altogether, indicated Congress' intent "to revert to the narrow common law definition of burglary in the amended statute." Headspeth, 852 F.2d at 758. The court found this common law definition more compatible with subsection (ii)'s "focus on conduct which poses a serious potential risk of injury to the person." Id. The court then held that Headspeth's prior conviction for "storehouse breaking" did not come within the common law definition of burglary.

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conduct constituting a Federal or State offense. 18 U.S.C. App. § 1202(c)(2) (repealed).

In considering whether Headspeth's prior offense for "storehouse breaking" could nevertheless serve as the basis for sentence enhancement under § 924(e), the court proceeded to determine whether "storehouse breaking" was a crime which, under subsection (ii), "otherwise involves conduct that presents a serious potential risk of physical injury to another." Id. at 758-59. The court found that this clause of subsection (ii) must be limited to "offenses, which, as defined, pose by their very nature a serious potential risk of injury to another." Id. at 759 (emphasis in original). It concluded that while "[w]hile particular instances of storehouse breaking may, on occasion, present some risk of injury to a person, the crime itself is not one which, like common law burglary . . . poses such a risk by its very nature. Id. at 758-59 (emphasis in original).[7]

[7]The conduct underlying this offense may

The Fourth Circuit's conclusion that, in considering prior offenses for sentence enhancement under § 924(e)(2)(B)(ii), the court must limit its inquirey to the nature of the prior offense as defined in the statute is completely consistent with our decision. It is true that some of its language, equating the statutory reference to "burglary" in § 924(e)(2)(B)(ii) with the common law definition of burglary, is arguably contrary. The Fourth Circuit, however, never addressed the problem confronting us today: whether or not § 924(e)(2)(B)(ii)'s reference to burglary encompasses a crime which the state denominates "burglary" but which falls outside the scope of the common law crime of burglary.

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well have been found to involve the potential for physical injury to others, since Headspeth had thrown a brick through the plate glass window of a jewelry store in committing the crime.

The Eleventh Circuit recently addressed precisely this issue, and rejected the conclusions implied by the Headspeth court. United States v. Hill, 863 F.2d 1575 (11th Cir. 1989). After an exhaustive inquiry into the legislative history of § 924(e), the Eleventh Circuit concluded that the various proposals differed only as to the extent Congress should expand the predicate offenses. Id. at 1581. The court criticized the Fourth Circuit's decision in Headspeth, concluding that "[i]t would be odd indeed to conclude from this desire to expand the predicate offenses that Congress somehow intended to revert to the common law definition of burglary when that definition was never once mentioned in the legislative history of the act." Id. In addition, the court noted that since most states had abandoned the old common law definition of burglary, it was unlikely that Congress intended a meaning for burglary

that "is little more than an historical anomaly today." Id. at 1582.[8] The court concluded that any burglary within the definition of the prior act would be burglary within the meaning of § 924(e)(2)(B)(ii). The Hill court did not indicate how it would consider burglaries that did not come within the definition of the prior act.

(2) We conclude that a conviction for a crime which the state denominates "burglary" is a conviction for burglary within the meaning of § 924(e)(2)(B)(ii). The sentencing court need not inquire into the elements of the state law offense, or into the particular behavior underlying the defendant's conviction. Every circuit squarely confronting this issue has so held, and we agree. Leonard was convicted of crimes which Texas denominates "burglary." We therefore

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[8]The court noted that some twenty-six states, including Texas, have abandoned the common law definition of burglary in favor of one that varies the degree of the offense

find no error in the trial court's decision to enhance Leonard's sentence based on these prior burglary convictions.

III.

Leonard finally argues that § 924(e) is an unconstitutional ex post facto law. U.S. Const. art. I, § 9, cl. 3. He claims that Congress' enactment of § 924(e)(2)(B) in 1986 retrospectively defined his prior burglary convictions as "violent felonies" when "neither his conduct nor his convictions ha[d] such a character under Texas law."

(3,4) An ex post facto law is a criminal or penal measure which is retrospective and is disadvantageous to the offender because it may impose greater punishment. Weaver v. Graham,

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according to the nature of the structure, whether it was occupied, and/or whether force of injury was threatened. Five states make no such distinctions, and five other states have retained the common-law definition of burglary. Fourteen states were not surveyed. Hill, 863 F.2d at 1582 n. 5.

450 U.S. 24, 28-29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); Dobbert v. Florida, 432 U.S. 282, 292-93, 97 S.Ct. 2290, 2297, 53 L.Ed.2d 344 (1977). Leonard's argument reflects a misunderstanding as to the function of his burglary convictions under the statute. Neither his conviction nor the sentence he complains of punishes him for those prior offenses. Those offenses merely led to an enhanced sentence for his new crime. Leonard pled guilty to violating § 922(g)(1) on May 26, 1988, after the effective date of § 924(e)(1). Section 924(e) is not retrospective because it bases enhancement of his sentence upon convictions which preceded its enactment.

In Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948), the Supreme Court rejected the argument that a recidivist statute operated retroactively as an ex post facto law simply because the offense that gave

rise to the accused's status as a habitual offender occurred prior to the effective date of the recidivist statute.

The Court Explained:

> The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

334 U.S. at 732, 68 S.Ct. at 1258.

Accordingly, we find that § 924(e) does not violate the Constitution's prohibition against ex post facto laws.

For the reasons stated above, we affirm the enhanced sentence imposed by the trial court under § 924(e).

AFFIRMED.